

DRAFT TRIBAL CONSULTATION POLICY

State Water Resources Control Board
California Environmental Protection Agency



State of California

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To Water Board staff and California Tribal leaders and members,

Engaging with California Native American tribes is not only directed by Governor Brown's Executive Order B-10-11, it is absolutely fundamental to the mission of the State Water Resource Control Board and Regional Water Quality Control Boards (the Water Boards). Collaboration and input from all Californians affected by our actions helps the Water Boards make better decisions as we work to protect California's water quality and resources for people and wildlife alike. Working with Native American tribes holds a special value here because of our parallel relationship to the people we serve and because of tribes' historic knowledge and experience, and in some cases, unique needs.

By working collaboratively over the past decade, we, the Water Boards and California Native American tribes, have strengthened our relationships, assisted with specific projects and funding for individual tribes and have achieved some notable substantive results. For example, in the policy realm, together we have developed and defined Tribal Beneficial Uses for water quality purposes, acknowledging the importance of Tribal Ecological Knowledge and the real world needs and concerns that tribes have that differ from non-tribal practice and uses to be protected.

The Water Boards are committed to build upon these recent examples of successfully working together toward our common goals. This policy is intended to serve as a guide for our staff to appropriately engage with tribes and foster strong, effective, and respectful government-to-government relationships. We encourage staff to use this policy in a thoughtful and meaningful way, to strengthening our relationships with tribal governments and to be of service to the people and environmental objectives we jointly serve.

Sincerely,

Felicia Marcus, Chair

Eileen Sobeck, Executive Director

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I. POLICY STATEMENT

The State Water Resources Control Board (“State Water Board ” or “SWRCB”) and the nine Regional Water Quality Control Boards (“Regional Water Boards”) (together the “Water Boards”) policy is to develop effective communication with all California Native American tribes (“tribes”) that allows for meaningful participation and input while developing or revising the Water Board’s regulations, rules, policies, programs or plans that may impact tribes. It is the intent of this policy to establish the guiding principles to consult with California Native American tribes on a government-to-government basis when requested and deemed appropriate, or as required by Assembly Bill (AB 52).

The Water Boards will continue our commitment to meaningful involvement with California Native American tribes by recognizing tribal culture, history, environmental and water concerns. We value integrating tribal input and continuously educating both staff and tribes as outlined in this policy. Thus enhancing the Water Boards’ activities, policies, and decision-making process.

II. PREFACE

In 2011, Governor Edmund G. Brown Jr. signed [Executive Order B-10-11](#) which established, among other things, a policy that encouraged all state agencies and departments including the Water Boards to communicate and consult with California Native American tribes and provide an opportunity for meaningful input into the development of legislation, regulations, rules, and policies on matters that may impact tribal communities.

This Tribal Consultation Policy (Policy) affirms the Water Boards continued commitment to strengthening and sustaining government-to-government relationships with both federally and non-federally recognized California Native American tribes. The Water Boards are committed to the foundation and principles outlined in the California Water Boards Tribal Consultation Policy.

The intent of this policy is to guide our staff to engage aptly with California Native American tribes through timely and meaningful consultation and collaboration on actions that may have an impact to tribal lands and/or cultural resources consistent with the mission of the Water Boards. This policy establishes statewide general guidelines for tribal consultations across the Water Boards. Included within this policy are the foundations and tools necessary to foster and sustain meaningful government-to-government relationships between the Water Boards and California Native American tribes. This policy is consistent with the processes outlined in the [California Environmental Protection Agency \(CalEPA\) policy](#), and builds upon the CalEPA consultation policy to the Water Board’s specific projects and mission.

III. BACKGROUND

CALIFORNIA NATIVE AMERICAN TRIBES

According to the 2010 U.S. Census, California has the largest Native American population in the United States. California is the home state to the second largest number of federally recognized tribes in the nation. There are currently 110¹ federally recognized Tribes in California as determined by the Bureau of Indian Affairs (BIA). Federally recognized Tribes may enact Tribal codes that effect natural resources, public health and environmental protection, and may apply for treatment in the same manner as a state under certain federal environmental laws, including but not limited to the Clean Water Act and Safe Drinking Water Act. The Native American Heritage Commission (NAHC) maintains a list for purposes of state law that includes 56² non-federally recognized Tribes in California³.

California Native American tribes, whether officially recognized by the federal government or not, may have distinct environmental, economic, cultural and public health concerns separate from the concerns of other tribes and the general public. No one individual tribe can speak for another tribe or for California Native American tribes as a group. Consistent with the Governor's directive, the State Water Board recognizes the importance of and is committed to building government-to-government relationships with all California Native American tribes.

CALIFORNIA WATER BOARDS' (WATER BOARDS) MISSION

Since its establishment in modern form in 1967, the State Water Board has had regulatory authority for protecting water quality and allocating surface water rights. In 2014, the Division of Drinking Water was transferred to the State Water Board. The Division of Drinking Water regulates public water systems; oversees water recycling projects; permits water treatment devices; and promotes water system security. The Water Boards have worked to maintain the protection of water quality via an array of programs, such as storm water, wastewater treatment, water quality monitoring, wetlands protection, ocean protection, contaminated site cleanup, low-impact development, and enforcement strategies. The Water Boards act in an enforcement capacity when the laws and regulations protecting California's waterways are violated.

The Governor appoints five full-time Board members to carry out the Board's mission "*to preserve, enhance, and restore the quality of California's water resources and drinking water for the protection of the environment, public health, and all beneficial uses, and to*

¹ These numbers are subject to change.

² IBID

³ Tribes petitioning for federal recognition can be tracked at <https://www.bia.gov/as-ia/ofa>. Further there are some California Native American tribes (such as the Fort Mojave, Quechan Tribe of the Fort Yuma Indian Reservation and Colorado River Indian Tribes) that have land in multiple states. There are some tribes that have historic tribal territory once in California but no longer reside here or were removed.

ensure proper water resource allocation and efficient use, for the benefit of present and future generations". Additionally, each of the nine semi-autonomous Regional Boards have seven part-time Board members also appointed by the Governor. Each Regional Board makes critical water quality decisions for its region, including setting standards, issuing permits (waste discharge requirements), determining compliance with those requirements, and taking appropriate enforcement actions.

IV. DEFINITIONS

For this Policy, the following terms are defined below:

Agency Designee is an individual that represents the Water Boards during consultation.

Assembly Bill 52 (AB 52) passed in 2014, amended the Public Resource Code (PRC) and requires as July 1st 2015 all California Environmental Quality Act (CEQA) lead agencies within 14 days of a undertaking a project to consult a California Native American tribe(s) that are traditionally and culturally affiliated with the geographic area of the proposed project if: (1) the California Native American tribe requested to the lead agency, in writing, to be informed by the lead agency through formal notification of proposed projects in the geographic area that is traditionally and culturally affiliated with the tribe, and (2) the California Native American tribe responds, in writing, within 30 days of receipt of the formal notification, and requests the consultation.

Beneficial Use(s):

Tribal Tradition and Culture (CUL) a defined beneficial use of water that supports the cultural, spiritual, ceremonial, or traditional rights or lifeways of California Native American tribes, including, but not limited to: navigation, ceremonies, or fishing, gathering, or consumption of natural aquatic resources, including fish, shellfish, vegetation, and materials.

Tribal Subsistence Fishing (T-SUB) a defined beneficial use of water involving the non-commercial catching or gathering of natural aquatic resources, including fish and shellfish, for consumption by individuals, households, or communities of California Native American tribes to meet needs for sustenance.

California Native American tribe refers to either a federally recognized California Tribal government listed on the most recent notice of the Federal Register or a non-federally recognized California tribal government listed on the California Tribal Consultation List maintained by the California Native American Heritage Commission (NAHC).

Collaboration refers to communicating and working together through mutual respect and cooperation toward a common purpose.

Communication refers to the dissemination, exchange or sharing of information between Water Boards' staff and California Native American tribes.

Consultation is a meaningful and timely process of seeking, discussing, and considering carefully the views of others, in a manner that is cognizant of all parties' cultural values and, where feasible, seeking agreement.

Federal Recognition refers to acknowledgement by the federal government that an American Indian group indigenous to the continental United States and members constitute a tribe with a government-to-government relationship with the United States. This recognition confers the Tribe's eligibility for programs, services, and other relationships established by the United States for Indians, because of their status as Indians. Acknowledgement shall subject the Indian tribe to the same authority of Congress and the United States to which other federally acknowledged tribes are subjected (25 CFR § 83.1 - 83.46).

Government-to-Government Relationship is a relationship that exists between governments. Implicit in the relationship is a mutual recognition of the governmental nature of the respective parties, and the authority with which they represent a people. Tribes are governments, which sets them apart from any other stakeholder.

Historic Tribal Territories are lands to which a tribe has a historic (pre-colonial) connection via long term occupancy, habitation, ceremonial or subsistence use.

Indian Country or Tribal Lands means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation; (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state; and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same (18 USC. § 1151).

Regional/Divisional Tribal Coordinator is an individual at each of the nine Regional Water Quality Control Boards and the four divisions at the State Water Board, the Division of Water Quality (DWQ), Division of Water Rights (DWR), Division of Drinking Water (DDW) and the Division of Financial Assistance (DFA) who with direction from of the State Board Tribal Liaison and their respective Assistant Executive Officer or Assistant Deputy Director are responsible for acting as the principle point of contact for staff in their respective offices to provide expertise regarding tribal consultation/coordination and support their Region/Divisions efforts of building government-to-government relationships with California Native American tribes.

Reservations are lands reserved by the federal government for a tribe, which are held in trust for the tribe by the federal government.

Tribal Cultural Resource are (1) sites, features, places, cultural landscapes, sacred places, and objects with cultural value to a California Native American tribe that are either included or determined to be eligible for inclusion in the California Register of Historical Resources or included in a local register of historical resources; (2) a resource determined by the CEQA lead agency, in their discretion and supported by substantial evidence, to be significant pursuant to criteria set forth in subdivision (c) of Section 5024.1, taking into account the significance of the resource to the California Native American tribe (3) a cultural landscape that meets the criteria of subdivision (a) is a tribal cultural resource to the extent that the landscape is geographically defined in terms of the size and scope of the landscape; (4) A historical resource described in Section 21084.1, a unique archaeological resource as defined in subdivision (g) of Section 21083.2, or a “nonunique archaeological resource” as defined in subdivision (h) of Section 21083.2 may also be a tribal cultural resource if it conforms with the criteria of subdivision (a) (Public Res. Code, § 21074).

Tribal Liaison will be designated by the Executive Director of the State Water Board to act in the capacity for coordinating between the Water Boards and California Native American tribes. The Water Boards’ Tribal Liaison is responsible for coordinating outreach, communication and consultation efforts with the Water Boards and Tribes.

Tribal Official An elected or appointed Tribal leader or official designated in writing by California Native American Tribe to represent the Tribe in government-to-government consultation.

Tribal Sovereignty refers to the unique political status of federally recognized tribes. A federally recognized tribe exercises certain jurisdiction and governmental powers over activities and tribal members within its territory. Some of these powers are inherent, some have been delegated by the United States, and all are subject to limitations by the United States. Existing limitations are defined through acts of Congress, treaties and federal court decisions.

V. GUIDING PRINCIPLES

The Water Boards will be guided by these principles and best practices to improve and maintain effective government-to-government relationships and consultation with Tribes;

1. Acknowledge, recognize and respect Tribal sovereignty;
2. Commit to building, strengthening, and sustaining effective government-to-government relationships between the Water Boards and California Native American tribes;
3. Recognize that all California Native American tribes represent distinct and independent governmental entities with specific beliefs, traditions and unique connections to the area(s) of California that are their current and/or ancestral homelands;
4. Understand and recognize that federally recognized tribes have a unique trust relationship with the federal government;
5. Understand and recognize that no one tribe speaks for another;
6. Communicate with Tribes in a manner that is considerate and respectful;
7. Communicate, engage and, if appropriate, consult with California Native American tribes at the initial stage in the decision-making process that may affect tribal cultural resources, lands and or people;
8. Consider and review a Tribes' own consultation policy, if provided, before initiating consultation with that tribe;
9. Consider the potential impact of the Water Boards' activities or programs on Tribal lands and cultural resources;
10. Identify appropriate and essential Water Board officials and staff to be present in a consultation. This will generally include individuals who are knowledgeable about the subject at hand, who are authorized to speak for the Board, who have decision making authority, and who have a working relationship with the tribe.
11. Acknowledge the need and importance for confidentiality regarding places, land, cultural resources and matters discussed in consultation;

12. Recognize and respect the cultural resources of California Native American tribes regardless of where they are located;
13. Inquire which method of communication the tribe(s) prefer during the consultation process including, but not limited to phone, e-mail, fax or certified mail;
14. Take into consideration traveling to Tribal lands for consultations when feasible.

VI. ACTION PLAN

1. Continue to solicit input from the CalEPA Tribal Advisory Committee (TAC) regarding environmental issues and projects pertaining to California Native American tribes. The TAC meets with the Secretary of the CalEPA and heads of each Board, Department, and Offices (BDOs), or their designees, at least once each calendar year;
2. Designate a Tribal Liaison within the Water Boards as a central point of contact for all California Native American tribes;
3. Promote efforts of California Native American tribes to develop and expand environmental programs through training, outreach, and technical assistance.
4. Provide training to executive staff, managers, supervisors and employees to improve the Water Boards' ability to carry out meaningful consultation and communication efforts with tribes.
5. Develop and provide tribal cultural competency training for SWRCB executive, managers, supervisors, and staff on tribal interactions and consultation practices;
6. Develop a supplemental guide for Water Board staff to assist in carrying out consultation with California Native American tribes, with tools and guidance that will be Water Board program specific.
7. Provide training to California Native American tribes on Water Board programs, permits and policies.
8. Request relevant available information, studies and data from California Native American tribes when conducting research or environmental studies that relate to, or could impact Tribal lands or cultural resources.
9. Assess eligibility of California Native American tribes for the Water Boards' financial assistance programs, including but not limited to grants, and loans.

10. Develop Memorandums of Understanding (MOU), Memorandums of Agreement (MOA), or other cooperative agreements with California Native American tribes on specific projects or subject matters, when appropriate.
11. To ensure effective coordination each Regional Board, Division and Office of the State Water Board will provide the Tribal Liaison an update once completed on all tribal consultations.
12. Each Regional Water Quality Control Board and the four Divisions of the State Board will designate a staff person to be their respective Regional/Divisional Tribal Coordinator. The time commitment of this position will vary depending on the extent of tribal coordination in which that Division or Regional Board has historically been engaged.

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VII. CONSULTATION DISPUTE RESOLUTION

A Tribal official may address concerns regarding Water Board consultation in writing to the Tribal Liaison at Tribal-Liaison@waterboards.ca.gov or at the following address: Tribal Liaison, State Water Resources Control Board, 1001 I Street Sacramento PO Box 100, CA 95814.

The Tribal Liaison will work with Water Board staff and the Tribe to resolve the issue to the parties' mutual satisfaction. If the Tribal Liaison is unable to resolve the issue, they may refer the matter to the Executive Director, Region EO or another appropriate level of authority.

VIII. DISCLAIMER

The State Water Boards' Tribal Consultation Policy describes broad principles for the consultation process between the Water Boards and Tribes. This policy is intended solely for the guidance of the employees of the Water Boards regarding tribal consultation and does not extend to other governmental agencies or entities. This policy shall complement, not supersede, any preceding laws, rules, statutes or regulations that guide consultation processes with Tribes. This Tribal Consultation Policy shall not be interpreted to replace existing policies of the Water Boards. Nothing in this policy shall be interpreted to prevent the Water Boards from taking timely action to fulfill legal obligations to protect public health and the environment.

STATUTORY REFERENCES

Federal

Title 18 United States Code section 1151: The United States Code defines “Indian Country” as “(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.”

Title 25 United States Code section 3001, et seq.: The Native American Graves Protection and Repatriation Act (NAGPRA) requires consultation regarding the treatment and disposition of specific cultural items (human remains, funerary objects, sacred objects, and cultural patrimony) prior to intentional excavation or removal of Native American human remains, during the inventory of human remains, and to determine place and manner of delivery.

State

Executive Order B-10-11: Recognizes and reaffirms the inherent right of Native American Tribes to exercise sovereign authority over their members and territories, establishes the Governor’s Tribal Advisor position within the Governor’s Office, reaffirms the state’s commitment to working with Tribes, and encourages communication and consultation with Tribes.

Government Code section 11019.8: “All state agencies, as defined in [Government Code] section 11000, are encouraged and authorized to cooperate with federally recognized California Indian tribes on matters of economic development and improvement for the tribes.” This may include, but is not limited to, providing information on programs available to assist Indian tribes, providing technical assistance on preparation of grants and applications for public or private funds, conducting meetings and workshops, or any other reasonable steps that could assist tribes in becoming economically self-sufficient.

Government Code section 65352.4: “‘Consultation’ means the meaningful and timely process of seeking, discussing, and considering carefully the views of others, in a manner that is cognizant of all parties’ cultural values and, where feasible, seeking agreement. Consultation between government agencies and Native American tribes shall be conducted in a way that is mutually respectful of each party’s sovereignty. Consultation shall also recognize the tribes’ potential needs for confidentiality with respect to places that have traditional tribal cultural significance.”

Health & Safety Code section 8012, et seq.: The California Native American Graves Protection and Repatriation Act requires any agency or museum that has possession or control over California Native American human remains and associated funerary objects

to inventory, attempt to identify the geographic location, and consult with the tribe believed to be affiliated with the items.

Health & Safety Code section 7050.5: “In the event of discovery or recognition of any human remains in any location other than a dedicated cemetery, there shall be no further excavation or disturbance of the site or any nearby area reasonably suspected to overlie adjacent remains until the coroner of the county in which the human remains are discovered has determined. If the coroner recognizes the human remains to be those of a Native American or has reason to believe that they are those of a Native American, he or she shall contact, by telephone within 24 hours, the Native American Heritage Commission”.

Public Resources Code section 5024.1: Establishes a California Register of Historical Resources as an authoritative guide in California to be used by state and local agencies, private groups, and citizens to identify the state's historical resources and to indicate what properties are to be protected, to the extent prudent and feasible, from substantial adverse change.

Public Resources Code section 5097.9, et seq.: Prohibits a public agency, or private party using or occupying public property, or operating on public property, under a public license, permit, grant, lease, or contract made on or after July 1, 1977, from interfering with the free expression or exercise of Native American religion as provided in the United States Constitution and the California Constitution; or cause severe or irreparable damage to any Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property, except on a clear and convincing showing that the public interest and necessity so require. This chapter establishes the Native American Heritage Commission, and specifies its powers and duties.

Public Resources Code section 21073-74, 21080.31 et seq.: (Also referred to as Assembly Bill/ AB 52) Prior to the release of a negative declaration, a mitigated negative declaration, or an environmental impact report for a project, the CEQA lead agency is required to consult with California Native American tribes that are traditionally and culturally affiliated with the geographic area of the proposed project if the tribe requested notification and requested consultation for the project. The California Environmental Quality Act (CEQA) evaluates effects of the project on tribal cultural resources, historic resources, and archaeological resources as environmental impacts.

Public Resources Code section 71110: “The California Environmental Protection Agency, in designing its mission for programs, policies, and standards, shall do all of the following: (a) Conduct its programs, policies, and activities that substantially affect human health or the environment in a manner that ensures the fair treatment of people of all races, cultures, and income levels, including minority populations and low-income populations of the state. (b) Promote enforcement of all health and environmental statutes within its jurisdiction in a manner that ensures the fair treatment of people of all races, cultures, and income levels, including minority populations and low-income

populations in the state. (c) Ensure greater public participation in the agency's development, adoption, and implementation of environmental regulations and policies. (d) Improve research and data collection for programs within the agency relating to the health of, and environment of, people of all races, cultures, and income levels, including minority populations and low-income populations of the state. (e) Coordinate its efforts and share information with the United States Environmental Protection Agency. (f) Identify differential patterns of consumption of natural resources among people of different socioeconomic classifications for programs within the agency."

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